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SUPREME COURT OF THE UNITED STATES.

ROBERT C. MOTHERWELL, JR., Keeper of the PHILADELPHIA COUNTY PRISON, and Captain VLADIMIR BEHR, Master of the Russian Cruiser VARIAG,

Appellants,

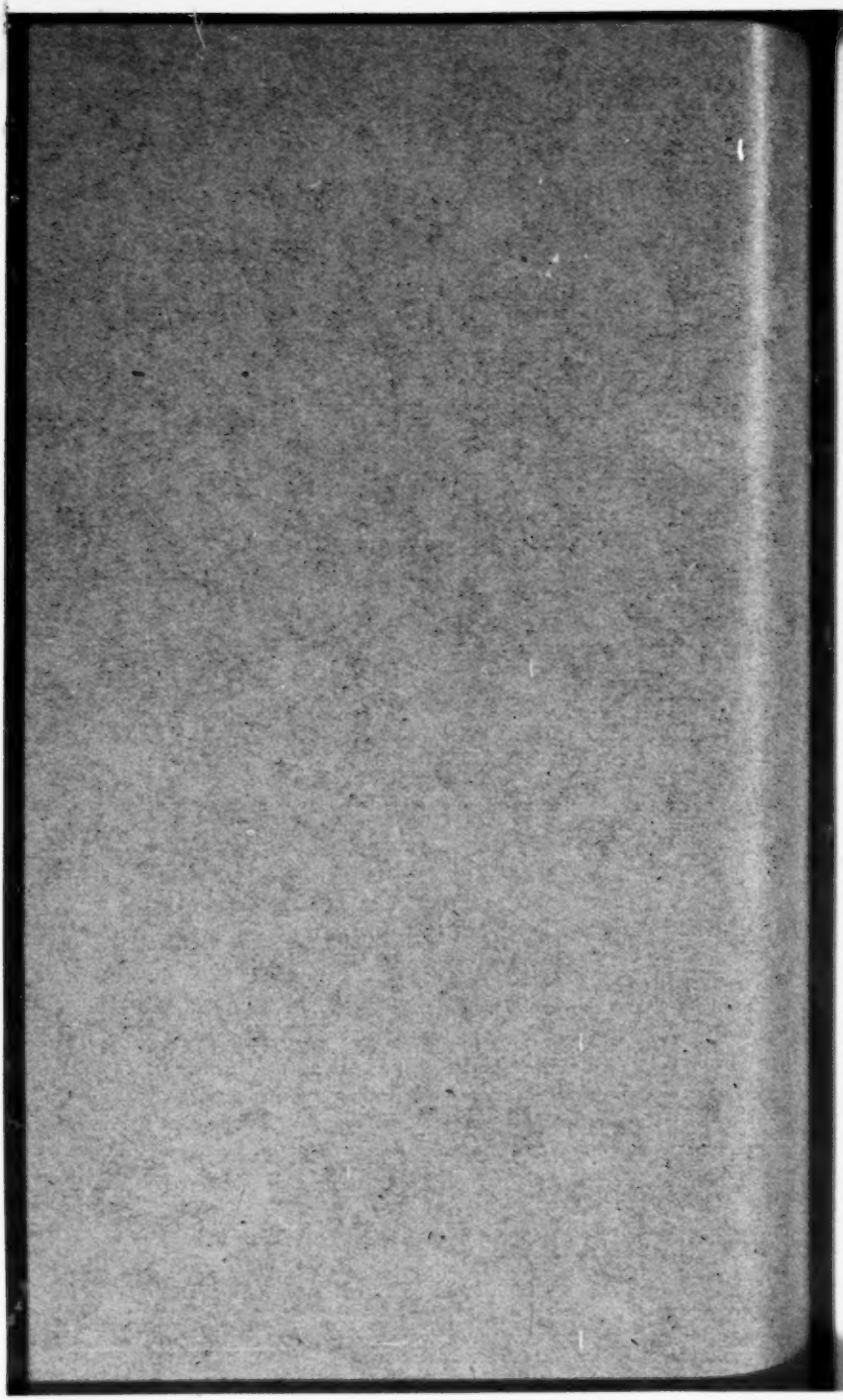
against

THE UNITED STATES OF AMERICA, ex rel., LEO ALEXANDROFF,

Appellee.

Petition for Writ of Certiorari.

LIVINGSTON MIDDLEDITCH CO., 68 DUANE ST., N. Y.



SUPREME COURT OF THE UNITED STATES

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and CAPTAIN VLADIMIR BEHR, Master of the Russian Cruiser *Variag*,

Appellants,

AGAINST

THE UNITED STATES OF AMERICA, *ex rel.* LEO ALEXANDROFF,

Appellee.

To the Supreme Court of the United States:

The petition of William R. Tucker respectfully shows to this Honorable Court:

I.—That he is the Vice-Consul of Russia at Philadelphia, Pa.; that Vladimir Behr is the Captain of the Russian Cruiser *Variag;* that Leo Alexandroff is a member of the crew of said vessel, and that Robert C. Motherwell, Jr., is the Keeper of the Philadelphia County Prison.

II.—That on or about the 11th day of April, 1898, The William Cramp & Sons Ship and Engine Building Company of Philadelphia entered into a contract with the Russian Minister of Marine, wherein and whereby in consideration of certain payments to it to be made, it agreed to supply to the Imperial Russian Government a Protected Cruiser, built, equipped, armed and fitted in accordance with certain preliminary specifications

and drawings, and in all respect equal to the best ships of corresponding type in the United States Navy.

III.—That in and by said contract it was provided:

"Art. 10, The Contractors agree, that the vessel to be built, as aforesaid, *whether finished or unfinished,* and all steel, iron, timber and other materials as may be required by the Contractors, and be intended for the construction of the said ship, and which may be brought upon the premises of the Contractors, shall immediately thereupon become, and be, the exclusive property of the Russian Ministry of Marine. The flag of the Imperial Russian Government shall be hoisted on the said ship, whenever desired by the Board of Inspection, *as evidence that the same is said Government's exclusive property,* and the Russian Ministry of Marine *may* at any time appoint an Officer or Officers *to take actual possession* of the said ship or material, whether finished or unfinished, subject to the lien of the Contractors for any portion of the value that may be unpaid."

That the parties to the contract also provided:

"Art. 12. The Contractors shall insure, and keep insured, against all risks usually insured against, the said vessel, its engines, and all fittings and materials at their own cost, *but in the name of, and for the benefit of, the Russian Ministry of Marine,* in fire insurance Companies previously approved by the Board of Inspection, and in such an amount or amounts as shall be, from time to time, sufficient to cover up and recoup to the Imperial Russian Government the sum or sums which said Government, for the time being, may have paid, or become bound to pay, to the Contractors in respect of such vessel."

That the parties further provided in and by their said

contract that notwithstanding the existence of any dispute between them

> "the Contractors shall not be entitled on any
> "ground whatever to withhold possession from the
> "Imperial Russian Authorities of the ships, or any
> "of its equipments, or any of the matters or things
> "as aforesaid, whether complete or in progress, as
> "hereinbefore provided."

IV.—That the construction of the said cruiser was commenced subsequently to the execution of the said contract and the cruiser was launched in or about October, 1899.

V.—That the said cruiser was known as the "*Variag*"; that a crew was duly detailed to man the same, from the Naval Battalions and Squadrons composing the Imperial Russian Navy, and that said crew was sent to the United States in various detachments and allowed to land by the Executive, acting through one of his Cabinet, viz., the Secretary of the Treasury, whose duty your petitioner is informed and believes extends peculiarly to such matters.

VI.—That authority to land the detachment containing the relator herein was duly given to the Russian Government by the Secretary of the Treasury of the United States, by reason of a letter of which the following is a copy:

"(36½)

"No. 19,805. TREASURY DEPARTMENT,
Office of the Secretary,
"WASHINGTON, D. C., October 4, 1899.

"SIR:

"Acknowledging the receipt of your letter of "24th ultimo, No. 557, I have the honor to inform "you that, in compliance with request contained "therein, instructions have been issued to the Com- "missioner of Immigration at the port of New

"York, to admit without examination *the detail*
"*of one officer and fifty-three regular sailors whom*
"*you state have been detailed to this country for*
"*the purpose of partially manning the cruiser now*
"*under construction for the Russian Government*
"*at Cramp's shipyard in Philadelphia, Pennsyl-*
"*vania.* The Collector of Customs has also been
"advised that the usual head tax of $1.00 is not to
"be collected in this case.

"Respectfully yours,

"O. L. SPAULDING,

"Acting Secretary,

"T. U. S."

VII.—That on or about the 14th day of October, 189[illegible], the relator, Leo Alexandroff, arrived at Philadelphia, and some time during the same month the *Variag* was launched.

VIII.—That pending the completion of the vessel, the relator lived with the crew that had been detailed as hereinabove stated.

IX.—That on or about the 20th day of April, 1900, the relator deserted from the crew of the *Variag*.

X.—That in and by Article VIII of the Treaty of Commerce and Navigation, concluded in 1832, between the United States of America and His Majesty, the Emperor of all the Russias, it is provided:

"The Consuls, Vice Consuls, and Commercial
"Agents shall have the right, as such, to sit as
"judges and arbitrators in such differences as may
"arise between the captains and crews of the ves-
"sels belonging to the nation whose interests are
"committed to their charge, without the interfer-
"ence of the local authorities, unless the conduct
"of the crews or of the captain should disturb the
"order of the tranquility of the country, or the

"said Consuls, Vice-Consuls, or Commercial "Agents should require their assistance to cause "their decisions to be carried into effect or sup- "ported. It is, however, understood that this "species of judgment or arbitration shall not de- "prive the contending parties of the right they "have to resort, on their return, to the judicial au- "thority of their country."

And in Art. IX thereof that:

"The said Consuls, Vice Consuls, and Commer- "cial Agents are authorized to require the assist- "ance of the local authorities, for the search, ar- "rest, detention and imprisonment of the deserters "from the ships of war and merchant vessels of "their country. For this purpose they shall apply "to the competent tribunals, judges and officers, "and shall in writing demand said deserters, prov- "ing, by the exhibition of the registers of the ves- "sels, the rolls of the crews, or by any other official "documents, that such individuals formed part of "the crews; and this reclamation being thus sub- "stantiated, the surrender shall not be refused.

"Such deserters, when arrested, shall be placed "at the disposal of the said Consuls, Vice-Consuls "or Commercial Agents, and may be confined in "the public prisons, at the request and cost of those "who shall claim them, in order to be detained "until the time when they shall be restored to the "vessels to which they belong, or sent back to their "own country by a vessel of the same nation or any "other vessel whatsoever. But if not sent back "within four months from the day of their arrest, "they shall be set at liberty, and shall not be again "arrested for the same cause."

XI.—That your petitioner not wishing through his subordinates to seize the deserter in any manner that might possibly disturb the peace, obtained from the cap-

tain of the cruiser, an affidavit setting forth the fact of desertion and presented the same to a United States Commissioner, whose assistance he requested for the arrest of the deserter; that a warrant was duly issued for the apprehension of the relator herein and that after his arrest the relator was duly committed by the Commissioner to the Keeper of the Philadelphia County Prison, subject to the order of your petitioner and the captain of the Cruiser *Variag*.

XII.—That on or about the 15th day of June, 1900. Leo Alexandroff, the relator herein, presented to the District Court of the United States for the Eastern District of Pennsylvania, a petition for a writ of *habeas corpus* and a writ was issued on or about the 18th day of June, 1900.

XIII.—That on the return of the writ testimony was adduced and the relator discharged.

XIV.—That the Honorable District Judge placed his decision on three grounds:

First.—That the *Variag* was not a Russian ship of war;

Second.—That the relator was not at the time of his decision, a member of her crew;

Third.—That if he was a member of her crew, the kind of proof required by the Treaty to prove his status was not offered.

XVI.—That as to such grounds, it is submitted:

First.—That the Treaty extends to all vessels and not merely to ships of war, and that the record most clearly and unequivocally shows that the *Variag* was the exclusive property of the Russian Government and possession thereof could not be withheld from it on any pretense whatever.

SECOND.—That the relator conceded that he came to this country as a member of the Russian Navy and had been assigned as an Assistant Physician to the Cruiser *Variag* and he testified under oath that while here he "lived together with the crew" and was under the control "of the superior officers of the crew."

THIRD.—That the Treaty provides for the *exhibition* of the registers of the vessels, the rolls of the crew or *other official* documents, to the officer where assistance in the arrest is required to prove that a deserter is a member of the crew; that on the hearing, Counsel for the Russian Government proceeded to introduce in evidence certain official documents including a passport, to show that the proceedings before the Commissioner were strictly in accorance with the Treaty and the Revised Statutes; that the Counsel for the relator admitted that the proceedings were in accordance with the Treaty and the Revised Statutes and that the relator came to this country as a member of the Russian Navy to become one of the crew of the Cruiser *Variag*.

XV.—That on appeal the determination of the District Judge was affirmed by the Circuit Court of Appeals held in and for the Third Circuit, but by a divided court.

XVI.—That the Circuit Court of Appeals approved both the conclusion reached by the learned District Judge in so far as a determination of the case depended on the treaty and the reasons assigned by him for the same.

That all three of the learned Judges of the Circuit Court of Appeals agreed moreover that good faith and international comity require the apprehension and surrender of a deserter from an organized body of either a foreign land or marine force allowed to land in this country by permission of the Executive; that one believed that the rule of comity did apply to this

case while the other two concluded that it did not, each however assigning an entirely different reason for his determination and each disagreeing from the other as to such reason.

That Mr. Justice Dallas decided that the rule did not apply because the relator did not belong to an organized body, and that while a crew was an organized body the relator was not a member of a crew notwithstanding his testimony that while in Philadelphia he lived with the crew and was subject to the orders of his superior officers; that neither of the associates of Mr. Justice Dallas concurred in his reasoning.

That Mr. Justice Gray decided that the rule did not apply because the record was deficient of any evidence showing any express permission by the Executive to the Russian Government to land Captain Behr and his men as a military body, notwithstanding that the record did contain the letter of the Secretary of the Treasury permitting the landing of an officer and fifty-three regular sailors for the purpose of manning a war vessel the property of the Russian Government, that neither of the associates of Mr. Justice Gray concurred in his reasoning.

That there was no real agreement between any two of the learned Judges of the Circuit Court of Appeals and that therefore the conclusion of the two who chanced to agree in the result though dissenting from each other as to reasons for the same should be reviewed by this Court.

XVII.—That the Treaty above mentioned provides in Article VIII thereof that the Consuls, Vice-Consuls and Commercial Agents shall have the right as such to sit as judges *without the interference of the local authorities* in such differences as may arise between the captains and crew of the vessel belonging to the nation whose interests are committed to their charge, but that the judgment of such consular court shall not

deprive the contending parties of the right they may have to resort *on their return to the judicial authority of their country.*

That the meaning and intent of this provision was to clothe the Consuls or Vice-Consuls of the United States in Russia and of Russia in the United States with jurisdiction exclusive of the local tribunals of all matters of difference between captains and their crew, and that the right to review the determination of such consul or vice consul is conferred on and confined to the courts of the country to which the parties belong.

That the Treaty further provides in Article IX thereof that application may be made to the local authorities to *assist* in the apprehension of deserters and that such assistance shall not be refused where the request is in writing and an official document is presented showing that the accused was a member of the crew from which he is charged with deserting; that your petitioner duly applied for such *assistance* to a United States Commissioner, pursuant to the provisions of the Revised Statutes and that the relator herein admits that the proceedings were in accordance with the Treaty and the Revised Statutes.

XVIII.—That inasmuch as there was a *vessel* here, the property of the Russian Government, and as the relator was a member of the crew assigned to that vessel the District Court of the United States was without jurisdiction to interfere with the action of your petitioner in the proceedings taken for the arrest of such deserter, in which he was entitled to the assistance alone of the local authorities.

XIX.—That in and by the said Treaty it is also provided that the Consuls, Vice-Consuls, Agents and Commissioners shall enjoy the same privileges and powers as those of the most favored nations.

That a reference to the powers and authority of Con-

suls under and by virtue of other treaties most clearly shows that the jurisdiction of the consular courts is exclusive of the courts of the country to which they are assigned.

The Treaty of 1880 with Belgium in Articles XI and XII thereof provides that the consular courts shall alone take cognizance of differences arising at sea *or in port* between a captain and his crew particularly in reference to the adjustment of wages *and the execution of contracts* and further that the Consuls, etc., may cause the arrest of all persons "making part of the crew, *in any manner whatever*, of ships of war or merchant vessels of this nation, who may be guilty or *be accused* of having deserted said ships and vessels, for the purpose of sending them on board *or back* to their country." The Treaty further provides in Article XII thereof that on the written request by the consular officer for the arrest of the deserter and on exhibition of any official document showing that he belonged to the crew, the "*delivery* " *of the deserters cannot be refused* unless it should be duly proved that they are citizens of the country where their extradition is demanded at the time of their being inscribed on the crew list."

The Treaty of 1871 with the German Empire in Article XIII thereof contains similar provisions, conferring jurisdiction of all matters of difference between a captain and his crew on the consular courts and continues:

> " Neither any court or authority shall on any pre-
> " text interfere in these differences."

The Treaty further provides, in Article XIV thereof, that the consul cannot be called on to make affidavit to support his application for the arrest of a deserter.

The Treaty of 1878 with Italy, in Article XIII thereof, confers express authority on consular officers *to arrest* persons forming part of the crew of vessels of their nation guilty of or *charged* with desertion in order to

return them to their vessels or to send them back to their country. The consular officers, instead of personally arresting the deserters, *may* apply to the local authorities for assistance. Upon the written request of the consul, supported by the exhibition of an official document showing that the person whose arrest is sought without the support of any further proof or the exaction of any oath, the deserter not being a citizen or subject of the country in which the demand is made at the time of their shipment, *shall be given up.*"

Dispute having arisen between Italy and the United States with regard to the jurisdiction of consular courts, an agreement was reached in 1881 modifying the Treaty of 1878. It was then agreed that the consular courts should *alone* take cognizance of matters of difference between a captain and his crew, and that trial courts should not interfere under any pretext except to preserve the peace.

XXI.—That in all the Treaties entered into by the United States, it is apparent that it is the intention of the contracting parties to confer on the consular courts exclusive jurisdiction of all matters of difference between the captain of a vessel and members of his crew, and to assist such consular courts in the apprehension of deserters, and to leave undiminished the discipline which the captain of a ship of war is entitled to maintain among the crew of the same.

XXII.—That the contracting parties to the Treaty between the United States of America and the Empire of Russia have construed it as extending to the case of the relator herein and as requiring his apprehension and surrender to your petitioner, the latter Government by its attempt to obtain the relator and by the prosecution of this application, the former by the action of its Executive through the office of the Attorney General in suggesting to the Honorable the Judges of the Circuit Court of Appeals for the Third Circuit that the relator herein

should be remanded to the custody of the Keeper of the Philadelphia County Prison to await the order of your petitioner.

XXIII.—That this case involves the determination of international questions of great importance, to wit:

First: The construction of a Treaty between the United States of America and the Empire of Russia;

Second: The determination of the jurisdiction of consular courts;

Third: A determination of the question as to whether good faith and international comity, aside from all treaty stipulation, do not require that this country shall not afford an asylum to deserters of a foreign navy admitted into the country while in such foreign service with the assent of the Executive of this country for the express purpose of manning a vessel of war admittedly belonging to a friendly country.

Wherefore, your petitioner prays that a writ of *certiorari* may issue herein to the Circuit Court of Appeals for the Third Circuit, directing that this cause be certified to this the Supreme Court of the United States for its review and determination.

Dated April 8th, 1901.

W. R. Tucker
Petitioner.

Eastern District of Pennsylvania

WILLIAM A. TUCKER, being duly sworn, says, that he is the petitioner above named; that the foregoing petition is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me this 9th day of April, 1901.

W. R. Tucker

Charles E. Lex
Notary Public

FILED
APR 22 1901
JAMES H. McKENNEY,
Clerk.

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No. 642.

Brf. of Fuller & Lewis for Petitioner.

SUPREME COURT OF THE UNITED STATES.

Filed April 22, 1901.

ROBERT C. MOTHERWELL, JR., Keeper of the PHILADELPHIA COUNTY PRISON, and Captain VLADIMIR BEHR, Master of the Russian Cruiser VARIAG,

Appellants,

against

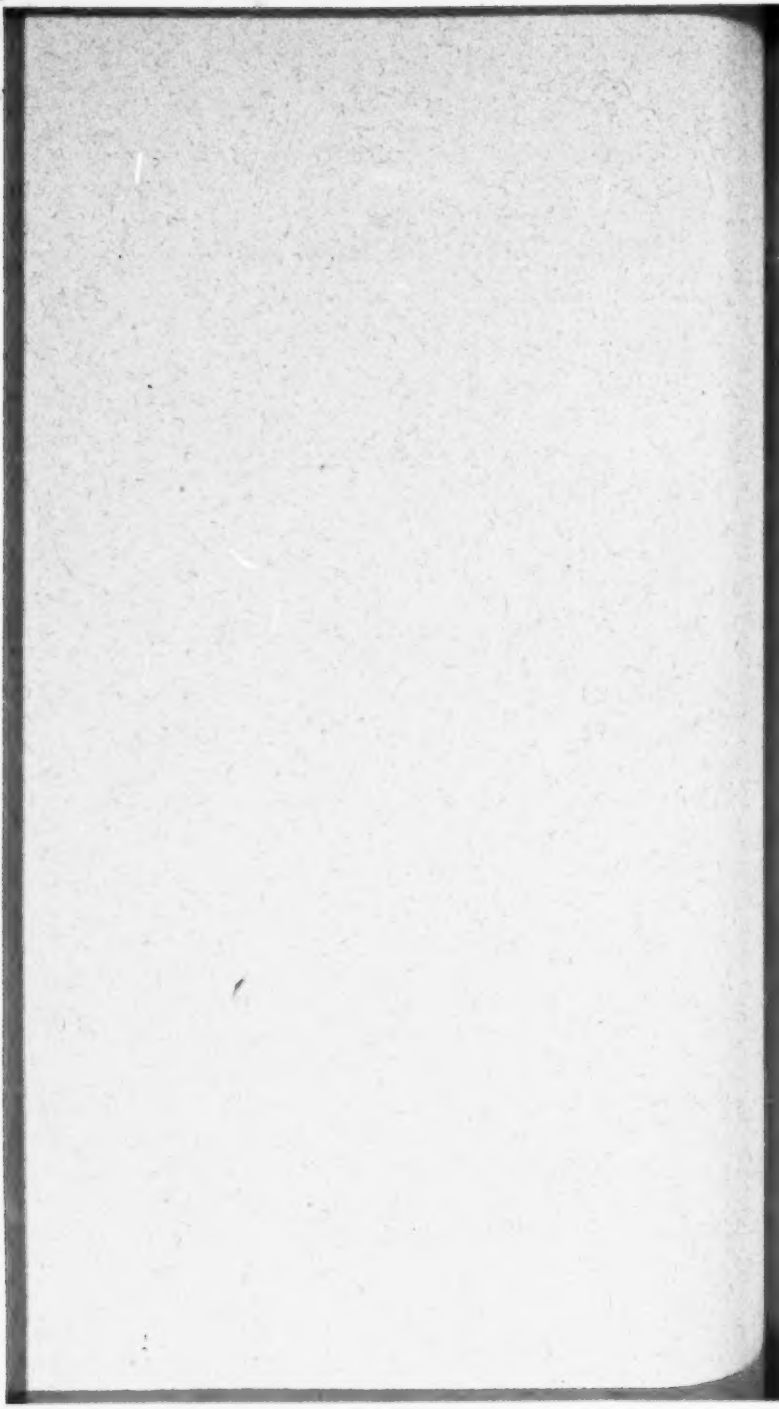
THE UNITED STATES OF AMERICA, ex rel., LEO ALEXANDROFF,

Appellee.

Brief in Support of Application.

PAUL FULLER,
JOHN F. LEWIS,
of Counsel for Petitioner.

LIVINGSTON MIDDLEDITCH CO., 65 DUANE ST., N. Y.



Supreme Court of the United States.

MOTHERWELL AND ORS.

v.

UNITED STATES *ex rel.* ALEXANDROFF.

Brief in support of Petition for Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

I.

This application answers all the requirements laid down by this Court in the case of LAU OW BEW, 141 U. S., 583 and 144 U. S., 53–58.

The question involved is of "great gravity and importance" and is "a matter of international concern" (141 U. S., 587–588).

It concerns the attitude which the local authorities should observe towards the military or naval forces of a friendly nation permitted to enter the ports of this country; whether such forces remain under the direct and immediate command of their soverign, and exempt from the civil and criminal jurisdiction of our courts, free from the exercise of our sovereignty, or whether such forces are on the other hand subject to the interference of the local authorities as if they were private citizens, liable to disintegration and dispersal, liberated from the discipline to which they were amenable when per-

faith, and it is stated that the general statutory provisions descriptive of the ordinary jurisdiction of the judicial tribunals should not be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction (p. 146).

The right so asserted by this Court does not depend upon any Treaty; the immunity results from the implied license to enter our ports and is a principle of public law. This principle has been embodied and re-stated in the Treaty between the United States and Russia fully quoted in the Petition for the writ of certiorari, which provides that Consular officers shall "sit as "judges in such differences as may arise between "the captains and crews of the vessels belonging to the nation whose interests are committed to their charge *without the interference "of the local authorities*" (Art. VIII), and that such Consular officers may "require the *assistance* of the local authorities" for the arrest of deserters, and that "such deserters when arrested shall be placed at the disposal of the said Consular officers" (Art. IX).

See also as to exclusive jurisdiction of Consular officers and the observance of this right by our courts:

Wildenhus Case, 120 U. S., 12.
The *Belgenland*, 114 U. S., 364.
The *Belvidere*, 90 Fed. Rep., 109.
The *Amalia*, 3 Fed. Rep., 653–654.

In a case which arose during the Crimean war, where a writ of *habeas corpus* was issued

and served at the port of San Francisco upon a British commander who had come into the port with a Russian prize, the commander disregarded the writ and sailed away with the prisoners in whose behalf the writ had been issued. Complaint having been made to the political authorities against this breach of international courtesy and disregard of the judicial jurisdiction the case was referred to the Attorney General; the action of the British commander was sustained and the jurisdiction of the Court to interfere with the commander of a foreign war vessel, in the exercise of the duty devolving upon him as such, was denied.

Belligerent Asylum, VII Atty. Gen'l. Op., p. 122.

IV.

The grounds upon which this international policy was disregarded and the principle of public law so clearly laid down in the case of the *Exchange* denied its proper application are various and are not uniform.

They are extremely technical and give to the rights and duties arising from friendly international relations,—the full and fair observance of which are so essential to their maintenance,—a narrow construction totally at variance with the broad and liberal interpretation which has hitherto been the rule.

They met, moreover, with a strong dissent

from one of the judges of the Circuit Court of Appeals.

We will briefly consider them:

First.—The District Court, *McPherson, J.*, conceding that the relator was a deserter from the Russian Naval Service, that the proceedings were regular, involving no dispute of fact, that the relator was one of a squad of seamen intended as portion of the crew of the Variag. (*p. 33, Printed Record*) holds:

A. That the Variag is an unfinished vessel, intended as a Russian Cruiser, but which may never acquire that character. (*p. 34, Record.*) Article 10 and Article 12 of the contract for the construction of the vessel (*Record, pp. 23-24*) shows that the ownership of the vessel was in the Russian Ministry of Marine. The vessel was launched in the fall of 1899—(*p. 15*) the relator did not desert until April, 1900 (*p. 6*).

Here is a vessel owned by the Russian Ministry of Marine launched and afloat, with a captain of the Russian Navy assigned to its command, and simply because it was "unfinished" it is held to have forfeited that immunity from foreign interference upon which the good understanding between nations so largely rests.

B. That the relator was not yet a member of her crew; that the vessel had no such organization in the sense intended by the Treaty (*p. 34*).

Yet the learned judge also holds that "the prisoner and certain associates were ordered to Philadelphia to serve as part of the cruiser's complement" (*p. 34*) but insists that technically they did not yet form a crew because "they had not yet begun that service, and may never be called upon to perform it" (*p. 34*).

The relator gave testimony relevant to the question whether or not he had "begun the service" as a member of the crew.

"I entered the service [the Russian "Navy] in 1896. [Since I have been in "America] I lived together with the crew "of the Russian ship that is in process of "construction (*p. 5*). I was never asked "to become a member of the crew [of the "Variag] but was simply sent there."

"Q. What was your treatment at the "hands of *the superior officers of the crew* "since you have been in this country?

"A. I cannot say that the superior officer "behaved very well toward me (*p. 5*).

"*I left the crew* on the 20th of April (*p. 6.*)

"I lived with the crew from October to "April. I received support from the Rus-"sian Government, but I claim I did not "ask for it. I was simply compelled to "serve and compelled to receive the wages.

"Q. Did you perform the duties required "of you as a member of this crew while you "were here between October and April?

"A. In so far as it was my place as as- "sistant physician" (*p. 9*).

Here we have an enlistment in the naval service; a "sending" of the enlisted man to form part of the crew, his living with the crew, subject to a superior officer; his support and payment of wages by the Russian Government, his service under compulsion and his performance of the duties consistent with his assignment. But because the crew had not yet formed their home aboard the vessel, it is held that there was no such "organization" as the Treaty contemplated and that the "service was not yet begun." It is under the shelter of such a technicality that a friendly country is held absolved from preserving to the naval authorities of another friendly country the right to maintain that discipline without which neither navies nor commerce could be held together.

C. That "the evidence specifically described "and made necessary by the Treaty itself "has not been produced;" that "no reg- "ister or roll of the crew or other official "document substantiating the Consul's "averment has been produced" (p. 34).

The first answer to this is that the Treaty does not require the production of these

papers before the Court on a return to a writ of *habeas corpus;* it authorizes the Consuls when applying to the "local authorities" for aid in the arrest of deserters to prove "that such individuals formed part of the crews" by the simple "*exhibition* of the register of vessels, the rolls of the crews or other official documents" (*Art. IX. of Treaty, p. 34 of Record*). These original documents, unsupported by any oath or any testimony are sufficient; they are not to be left with the authorities but simply "*exhibited.*" *Non constat* but that they were so exhibited to the Commissioner before he issued his warrant in aid of the jurisdiction of the Vice-Consul and Captain of the *Variag.*

On the contrary the record shows by admission that "the proceedings have been in "accordance with the Treaty and the Re-"vised Statutes" (*p. 17*).

To be "in accordance with the Treaty" is to admit that "the evidence specifically "described and made necessary by the "Treaty," to use the language of the Judge at *p. 34*, was forthcoming at the proper time and place, to wit, before the authorities whose aid was invoked.

The second answer to the Judge's statement that no register, roll or "other official document" was produced (*p. 34*) is that Counsel for the Vice-Consul and Captain tendered in evidence the passport issued by

the Government authorizing the men composing the crew to come to the United States, in proof of the fact that the relator came here as a portion of the crew of the cruiser.

The Court considered it unnecessary, stating this ground: "He came here as a "member of the Russian Navy, ordered "here to become one of the crew of the "cruiser *Variag*, and he came for that ex- "press purpose."

Here therefore was "an official document" tendered in evidence, and a statement by the Court that the fact to be proved by the document was unquestionably established.

The third answer in regard to the fatal character of the omission to present the register of the vessel or other official document, is that the exhibition of these documents and their acceptance as conclusive proof of the status of the person charged with desertion is an amplification and not a restriction of the methods of proof usually required in analogous prosecutions, and that such methods of proof become entirely unnecessary when as in the present there is such a practical admission by the relator, of the fact to be established.

Second.—*Dallas, J.*, of the Circuit Court of Appeals insists upon the unfinished condition of the cruiser, and upon the fact that although the

men had been assigned to the service of the crew "they had not yet entered upon it" and consequently no crew was yet "in being." Although the cruiser had been launched, the fact that the deserter had not actually been on board of her, (he had performed his duty of assistant physician nevertheless) was considered an important element, as though a crew could not be enlisted until actual sailing and as though enlistment for service on board a vessel did not actu ally make the enlisted man one of the members of that vessel's crew. On these refinements was made to depend the performance of an international duty of the highest order, and under these refinements was buried that comity that makes for universal peace.

The rule of comity as laid down by this Court in the case of the *Exchange* is repudiated, and the right to assistance in the recapture of a deserter is held to depend solely upon the Treaty, which is accepted as indicating "a change of law."

The Treaty, it is held, would have been applicable, had the relator been a member of a crew and had he deserted from a Russian ship, but there being no crew and no ship, the Treaty can not be invoked and therefore neither under the Treaty nor under the rule of comity can the Russian authorities get any relief.

Such comity as is recognized is confined to immunity from the assertion of jurisdiction.

But it is insisted that no such jurisdiction was asserted or exercised; that the jurisdiction was invoked by the Russian Vice-Consul on the assumption of rights created by the Treaty, and that assumption being unfounded the Court had no recourse but to order the prisoner's release.

This we submit is an error. All that the Vice-Consul did was to call for the assistance of the U. S. Commissioner in making the arrest. It is conceded in the Record that this proceeding was regular and in accordance with the Treaty; it was successful, the deserter was arrested, held, committed and placed at the disposal of the Vice-Consul.

At this juncture the District Court intervened, asserted and exercised jurisdiction over a member of the crew of the Russian cruiser, removed him beyond the reach of the Vice-Consul or the Captain of the cruiser, declared his arrest and detention unlawful, and set him at liberty. This was an active interference such as is prohibited by the Treaty; it was an infringement of the jurisdiction of the Vice-Consul guaranteed by the Treaty and it worked an injury to the discipline of the crew of a war vessel of a friendly power, to that extent crippling the efficiency of its naval forces peaceably visiting our country, in violation of the comity which independent of any Treaty assures to friendly nations the domination of their forces.

All this was done on the assumption that al-
" though " Capt. Behr and those who came with

"him were members of the Russian Navy," yet, "as an aggregation they were not an integral "component of it." This we respectfully submit is a close technicality such as should be discarded in weighing the privileges of friendly national forces relying upon the hospitality of our harbors.

Especially in presence of the action of the Executive Department of the Treasury directing the proper authorities "to admit without exam- "ination *the detail of one officer and fifty-three* "*regular sailors* whom you state have been *de-* "*tailed to this country for the purpose of partial-* "*ly manning the cruiser now under construc-* "*tion*," etc. (p. 18, Record).

It was precisely "as an aggregation"—"a de- "tail of one officer and fifty-three regular sailors" —that this permission was granted, but under the decision which we seek to have reviewed the Russian Government is to lose the benefit of treaty and of comity, because this particular Executive Department is not considered to have done anything but "an act of common courtesy" which cannot be construed into "a permission for their "landing."

Third.—*Gray, J.*, Circuit Court of Appeals, while agreeing that the arrest under the Treaty cannot be maintained, admits that Captain Behr "was in command of the detail of men belong- "ing to the Russian Navy and awaiting the "completion of the ship of war *Variag*."

He holds that the obligations of public law or comity would apply "to any organized military "force, however small, provided it was large "enough to be susceptible of military organiza- "tion and of acting offensively or defensively. "In this case, therefore," he continues, "I am of "opinion that the detail of fifty-eight men, if "organized as part of the military and naval "force of Russia *coming here for the purpose* "*disclosed by the record*, might sufficiently pos- "sess the character that would so far as this "case is concerned, be entitled to receive and "enjoy the comity and privileges flowing from "such a permission * * if properly granted "by our Government."

Here we have a divergence of views between the two concurring judges upon a fundamental proposition: whether the body commanded by Captain Behr and including the relator was a body entitled to the exercise of the comity which would exempt it from local jurisdiction.

But the exercise of this comity is made dependent upon proper permission being given by the Executive for the foreign contingent to land upon our soil. And the plain language of the Secretary of the Treasury admitting the detail of regular sailors and their commander is considered inadequate.

"It falls far short," says Judge Gray, "of "conveying to this Court the information that "the requisite permission was granted by the "President."

It seems obvious that if the Presidential permission had been sufficiently established by the Treasury Department order, Judge Gray would have applied to the case the comity which he admits was due to a body duly authorized to land, and Judge Dallas in lieu of Judge Bradford would have been the dissenting member.

The point then justifies some discussion.

The permission, insists the Judge, must be express and unequivocal and cannot be implied. Yet the opinion admits "that a different rule "obtains in the case of ships of war of one sov-"ereign visiting the ports and waters of an-"other. There is an implied authority among "nations to tolerate this, and extend to such "visits an international comity, founded on "universal custom and usage among nations. "* * * Ships of war from their vagrant "character constantly demand the hospitality of "foreign waters. They were made to traverse "the waters of the world and all nations find "that their interests and security demand the "hospitality of foreign waters. * * *"

In the present case we do not rely upon this implied permission. There is a clear permission from one of the Executive Departments that the detail of "regular sailors" and officers may land for the specific purpose of manning a Russian cruiser.

No implication is needed; the leave is explicit. It is *prima facie* plain and sufficient.

It lies upon those who impugn it to overturn it. It is in the interest of good faith among

When we add to this the doubt which we believe is cast upon the correctness of the decision by the examination of it here presented, we confidently rely upon the assistance of this Court to set at rest a question of such moment, the present condition of which might well result in the cessation of the far-reaching industry of constructing foreign war vessels, of which the cruiser *Variag* is the first example.

We respectfully submit that the prayer of the petition should be granted and the Writ of Certiorari issued.

19 April, 1901.

PAUL FULLER,
JOHN F. LEWIS,
Of Counsel for Petitioner.

Office Supreme Court, U.S.
FILED
APR 27 1901
JAMES H. McKENNEY,
Clerk

No. 303

Appx. to Br. of Petitioners.

Filed April 27, 1901.

SUPREME COURT OF THE UNITED STATES

October Term, 1900.

WILLIAM R. TUCKER, Vice-Consul of Russia, at Philadelphia, Pennsylvania,

Petitioner,

against

THE UNITED STATES OF AMERICA, *ex rel.* LEO ALEXANDROFF.

ADDENDUM TO BRIEF IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI.

Being correspondence between the Naval Attaché of the Imperial Russian Embassy and the Secretary of the Treasury; also between the Russian Embassy and the Secretary of State, and between the Secretary of State and the Attorney General.

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT, *April 6, 1901.*

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed are true and correct copies of the originals as appears from the files and records in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

L. J. GAGE.

[SEAL.] *Secretary of the Treasury.*

A.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

June 22, 1899.—No. 406.

Honorable LYMAN J. GAGE,
Secretary of the Treasury,
Treasury Department, Washington, D. C.

DEAR SIR: The Russian Ministry of Marine, of which in this country I am an official representative, some days ago has sent me a cable purporting that June 12th, on board some steamer, with destination for the United States, from St. Petersburg, Russia, had started a detail of one officer and twenty-nine (29) regular sailors, Imperial Russian Navy, for purpose of partially to man our cruiser, which at this time as you, Mr. Secretary, perhaps already know, is being under construction for the Russian Government, at Cramps' shipyard, Philadelphia, Pa.

Next week, or the one following the same, I expect this detail of our cruiser's crew will arrive in the port of New York, or that of Philadelphia, Pa., and by this reason I have the honor of respectfully requesting that the necessary orders to the proper United States authorities in the named ports be given, that the expected detail of the Russian cruiser's crew should be allowed to be landed without hindrance, and that of such permission given I should be kindly informed, to be able personally to attend to the business.

Hoping that my respectful request will be favorably met, I have the honor to remain, highly esteemed Mr. Secretary,

Yours, very truly,

(Signed) D. T. MERTVAGO,
Naval Attaché,
Imperial Russian Embassy
to the United States, N. A.

No. 19,024. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *June 23, 1899.*

General D. T. MERTVAGO,
Naval Attaché, Imperial Russian Embassy,
Washington, D. C.

SIR: Acknowledging the receipt of your letter of 22d instant, No. 406, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the Commissioners of Immigration at the ports respectively of New York and Philadelphia, to admit without examination the detail of one officer and

twenty-nine regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's shipyard in Philadelphia, Pennsylvania.

The Collectors of Customs have also been advised that the usual head tax of $1 is not to be collected in this case.

Respectfully yours,

(Signed) L. J. GAGE.
Secretary.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

September 24, 1899.—No. 557.

Honorable LYMAN J. GAGE,
Secretary of the Treasury,
Treasury Department, Washington, D. C.

DEAR SIR: Following the subject of my letter of June 22d last, and that of yours, No. 19,024, of June 23d, I have again the honor respectfully to request that the necessary orders to whom concerns, would be given for allowing admittance to the United States through the port of New York without examination the detail of one officer and fifty-three regular sailors, Imperial Russian Navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's shipyard, in Philadelphia, Pa.

The arrival of that detail is by me expected about October 7th next. The name of S. S. Line and of the steamer permit me to advise at a later period.

Hoping my respectful request will be favorably met, I have the honor to remain, highly esteemed Mr. Secretary,

Yours, very truly,

(Signed) D. T. MERTVAGO.
Naval Agent,
Imperial Russian Embassy
to the United States, N. A.

No. 19,805. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October 4, 1899.*

General D. T. MERTVAGO,
Naval Attaché, Imperial Russian Embassy,
Washington, D. C.

SIR: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the Commissioner of Immigration at the port of New York, to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramps' shipyard in Philadelphia, Pennsylvania.

The Collector of Customs has also been advised that the usual head tax of $1 is not to be collected in this case.

Respectfully yours,

(Signed) O. L. SPAULDING,
Acting Secretary,
F. A. V.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

October 5, 1899.—No. 591.

Honorable O. L. SPAULDING,
Acting Secretary, Treasury Department,
Washington, D. C.

DEAR SIR: Your valuable letter of yesterday, communicating the orders of the Treasury Department of the United States, with regard to the detail of one officer and 53 regular sailors now expected by me to arrive to this country by the mail steamer of the American line, "St. Paul," duly received, and I am in haste to present our greatest appreciation of the courtesy extended to us in the case, of which the Russian Government will be informed at once for international reciprocity in politeness.

Yours, very respectfully,

(Signed) D. T. MERTVAGO,
Naval Attaché,
Imperial Russian Embassy
to the United States, N. A.

No. 8600.

UNITED STATES OF AMERICA.

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the files and records of this Department.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the Seal of the Department of State to be affixed.

Done at the City of Washington, this 26th day of April, A. D. 1901, and of the Independence of the United States of America the one hundred and twenty-fifth.

[SEAL.] JOHN HAY.

[Revenue stamp.]

[Translation.]

WASHINGTON, *July 24—August 6, 1900.*

MR. SECRETARY OF STATE:

The President of the Commission for the Supervision of the Construction of the Russian War Vessels in America has informed me that the authorities of Philadelphia have declined to surrender to the proper Russian authorities a deserter, Alexandre Lvoff, assistant surgeon of the cruiser of the first-class, "*Variag*," who was arrested by the said authorities at the request of Commandant Berg, and that the said Alexandre Lvoff has been released by order of Judge McFersen (McPherson) of Philadelphia.

Inasmuch as Commandant Berg's request was based on Article IX of the Treaty of Commerce concluded between Russia and the United States in 1832, I have the honor to

address Your Excellency with the request kindly to inform the authorities of Philadelphia that Assistant Surgeon Alexandre Lvoff was one of the crew of the cruiser of the first-class, "*Variag*," and that, having deserted his post of duty, he must be delivered to the Russian authorities, in accordance with the provisions of the above-mentioned treaty.

Accept, Mr. Secretary of State, etc.,

G. DE WOLLANT.

No. 102. DEPARTMENT OF STATE,
WASHINGTON, *August 11, 1900.*

Mr. G. DE WOLLANT,
etc., etc., etc.

SIR: I have the honor to acknowledge the receipt of your note of the 6th instant requesting the assistance of the Department to secure the delivery to the Russian authorities of Alexander Lvoff, assistant surgeon of the Russian cruiser *Variag*, who, as appears from your note, was arrested as a deserter by the authorities of Philadelphia, but was released by order of Judge McFerson.

In reply I beg to inform you that a copy of your note has been sent to the Attorney General with the request that, if consistent with his views, he instruct the proper United States district attorney to put himself in communication with the President of the Commission for the Supervision of the Construction of the Russian War Vessels in America, and to render all proper advice and assistance in aid of the enforcement of the stipulations of the treaty of 1832.

Accept, &c.

ALVEY A. ADEE,
Acting Secretary.

DEPARTMENT OF STATE,

WASHINGTON, *August 11, 1900.*

The Honorable The ATTORNEY GENERAL.

Sir: I have the honor to enclose herewith a copy of a note from the Russian Chargé d'Affaires requesting the Department's assistance to secure the delivery to the Russian authorities of Alexander Lvoff, assistant surgeon of the Russian cruiser *Variag*, who, as appears from the note, was arrested as a deserter by the authorities of Philadelphia, but was released by order of Judge McFersen (McPherson?).

I beg to request that, if consistent with your views, you will instruct the proper United States district attorney to put himself in communication with the President of the Commission for the Supervision of the Construction of the Russian War Vessels in America, mentioned in the note, and to render all proper advice and assistance in aid of the enforcement of the stipulations of the treaty.

I have the honor, etc.

ALVEY A. ADEE,
Acting Secretary.

[Enclosure]:

From Russian Chargé, No. 245, August 6, 1900.

No. 103. DEPARTMENT OF STALE,

WASHINGTON, *August 15, 1900.*

Mr. GRÉGOIRE DE WOLLANT,

etc., etc., etc.

SIR: Referring to your note of the 6th instant, relative to the case of Alexander Lvoff, Assistant Surgeon of the Russian cruiser *Variag*, who, it appears, was arrested as a deserter by the authorities at Philadelphia, and was re-

leased by order of Judge McPherson, and to this Department's reply of August 11th, advising you of the reference of the matter to the Attorney General, I have the honor to inform you that I am in receipt of a letter from that official, who states that he has directed the United States Attorney for the Eastern District of Pennsylvania to render all proper advice and assistance to the Russian authorities in aid of the enforcement of the stipulations of the treaty of 1832 upon the subject of the arrest and detention of deserters from ships of war and merchant vessels of each country in the country of the other.

The Attorney General calls attention to the fact that the correspondence does not give the name or address of the President of the Commission for the Supervision of the Construction of Russian War Vessels in America, and he asks that his name be furnished in order that the United States Attorney may be fully informed.

Accept, etc.

ALVEY A. ADEE,
Acting Secretary.

No. 105. DEPARTMENT OF STATE,
WASHINGTON, *August 22, 1900.*

M. DE WOLLANT, etc., etc., etc.

SIR: Referring to your note of the 6th instant, and to those of this Department of August 11th and 15th, relating to the arrest at Philadelphia as a deserter and the subsequent release of Alexander Lvoff, late Assistant Surgeon of the Russian cruiser *Variag*, I have the honor to enclose copy of the opinion of the United States District Court granting an order of discharge to the prisoner. In furnishing this copy to me the Attorney General adds that it appears that

an appeal on behalf of the Russian authorities has been taken from this judgment to the Circuit Court of Appeals, and that said Lvoff has been held in bail to await the final determination of the proceeding on appeal.

The Attorney General repeats the request communicated to you in my note of the 15th instant for the name and address of the President of the Commission of the Construction of War Vessels in America, in order that the United States Attorney may place himself in communication with that gentleman and render him all proper advice and assistance in his power.

Accept, etc.

ALVEY A. ADEE,
Acting Secretary.

Enclosure: Opinion of United States District Court as above.

* ———

No. 122. DEPARTMENT OF STATE,
WASHINGTON, *December 15, 1900.*

His Excellency COUNT CASSINI,
etc., etc., etc.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 6th instant,* relative to the landing at Philadelphia of certain officers and men for the Russian war vessels *Variag* and *Revizan.*

Your note was at once referred to the Secretary of the Treasury, who replies as follows:

> "The Commissioner of Immigration at Philadelphia "has been directed to facilitate the landing of the sea- "men and officers referred to, and the Collector of "Customs will refrain from collecting the per capita

* For this note see insertion, *infra*, p. 13.

"tax from the steamship company. The said com-
"pany should be called upon to refund the amount paid
"to their Liverpool representative, in advance, for the
"head tax."

Accept, &c.

JOHN HAY.

(Translation.)

NEW YORK, *December 12/25, 1900.*

MR. SECRETARY OF STATE: The Imperial Ministry of the Russian Navy has just advised me that 213 seamen of the Imperial Fleet, accompanied by two officers, a monk, and a cook, have embarked at Liverpool on the ship *Belgenland*, bound for the port of Philadelphia, where they are expecting to arrive on the 16/29th instant.

In view of the fact that these seamen are sent hither to complete the crew of the Imperial cruiser *Variag*, I hereby pray Your Excellency to inform the Treasury Department of their arrival, so that they may land immediately upon the arrival of the vessel at Philadelphia.

I also beg Your Excellency to have the extreme kindness to allow the free entry of the boxes that are to arrive with the men and contain their personal effects and some articles shipped by the Ministry of the Navy, all for the cruiser *Variag*.

Lastly, I beg Your Excellency to take such steps as may be necessary for the return to the commanding officer of the tax imposed on immigrants, which is paid at the time of the sailing of the ship for the United States.

I embrace this opportunity, etc.,

CT. CASSINI.

No. 125. DEPARTMENT OF STATE,
WASHINGTON, *December 28, 1900.*

His Excellency COUNT CASSINI,
etc., etc., etc.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 25th instant relative to the entry at Philadelphia of the officers, seamen, etc., for the Russian cruiser *Variag*.

In reply, I have the honor to quote for your information the telegram sent on the 27th instant by the Secretary of the Treasury to the Collector of Customs at Philadelphia, and also an extract from Mr. Gage's letter reporting his instructions to the Commissioner of Immigration at the same port:

"Admit to entry free of duty and without examination baggage of two hundred thirteen seamen, two officers, a chaplain, and a cook of new cruiser *Variag*, arriving per *Belgenland* on twenty-ninth instant, also articles shipped by Ministry of Russian Navy.

"The Commissioner of Immigration at Philadelphia has been directed to facilitate the landing of the seamen and officers referred to, and the Collector of Customs will refrain from collecting the per capita tax from the steamship company. The said company should be called upon to refund the amount paid to their Liverpool representative in advance for the head tax."

Accept, &c.

JOHN HAY.

29165

(This should have been printed on page 10, supra, immediately preceding Mr. Hay's note of December 15, 1900.)

(Translation.)

RUSSIAN EMBASSY, *23 November,—6 December, 1900.*

MR. SECRETARY OF STATE:

The Russian Minister of the Navy has just informed me that 224 sailors of the Russian Imperial fleet, accompanied by three officers, one doctor, and a commissary, embarked at London on the American Line steamer *Rhineland*, for Philadelphia, where they should arrive about the 16th of December instant.

In view of the fact that these sailors are in the present service of the Russian Government, and 211 of them have been sent to complete the crew of the Russian cruiser *Variag*, and the other 13 are under orders for the *Retvizan*, which is being built by the Cramps, of Philadelphia, I have the honor to request Your Excellency to have the extreme kindness to notify the Treasury Department of the approaching arrival of these sailors, and to request that they may be allowed to land, and that restitution may be made to the superior officer of the tax imposed on emigrants and paid at the time of their embarkation.

Accept, Mr. Secretary of State, etc.,

COUNT CASSINI.

His Excellency,

JOHN HAY,

Secretary of State.